



WISCONSIN LEGISLATURE

P.O. BOX 8952 • MADISON, WI 53708

March 1, 2006

U.S. Fish & Wildlife Service
Upper Mississippi River National Wildlife and Fish Refuge
CCP Comment: Don Hultman, Manager
51 East 4th Street
Room 101
Winona, MN 55987

Dear Mr. Hultman:

Please accept these documents as our public comments on the Comprehensive Conservation Plan for the Upper Mississippi River National Fish and Wildlife Refuge. As state-lawmakers who represent Wisconsin portions of the refuge and, because federal enabling legislation required consent by state law before acquiring this land, we believe it is essential that we continue to be involved through the planning process.

We are still generally opposed to Alternative E because it usurps state authority on sovereign waters and unnecessarily eliminates treasured wildlife and non-wildlife based recreational opportunities and economic activity.

In 1925 our legislature consented to creation of the refuge under the conditions that we maintained the ability to preserve navigation in all waters and that the right to regulate fish and game would be a matter of state sovereignty. Additionally, we hold the right of the public to hunt and fish as a part of the right of navigation. As we explained in earlier comments, we view restrictions on the use of motors, areas closed to navigation, and new regulations as contrary to the agreement in our statutes and in federal law.

In our January 13, 2006 Legislative Council Memo, which is attached, we discuss these issues in detail. Again, we do not believe that the State of Wisconsin has the legal authority to abrogate our legal trust in the state's waters.

Our offices have heard from thousands of our constituents, more than 3,000 in writing alone, county boards, chambers of commerce, and hunting groups. Nearly every comment has been opposed to new restrictions and supportive of maintaining the current wildlife and non-wildlife related recreational opportunities.

Our constituents have not expressed a demand for non-motorized canoe areas. In fact, we are told just the opposite. Local government and DNR Law Enforcement may not be ready to take on the additional search and rescue efforts that will be needed if gasoline

motors are prohibited in certain areas. This is an experience that Wisconsin had in the Lower Wisconsin State Riverway.

Many people have told us that their access will be reduced by the prohibition of gasoline powered motors. Activities like trapping or hunting will be difficult for many people who are not physically able to canoe for great distances in severe weather.

We are concerned that your estimate of the acres of closed areas is misleading. For instance, the youth hunting area on Goose Island eliminates nearly all of the hunting that currently happens there. This is a favored area to hunt because people who do not have boats or other means can access this area on foot. Other areas are only open for portions of the season, but you count them as open. Open water areas, where hunting would not be allowed, are counted as open to hunting. Our constituents believe that the overall loss of hunting areas is not acceptable.

Your choice of closed areas and the precise location of boundaries remain controversial up and down Wisconsin waters of the refuge. You are proposing changes over such a broad area that you will not be able to reach agreement with user groups. Any changes should be made over time and on a pool-by-pool basis.

It is critical that you maintain the maximum amount of acres that can possibly be open to deer hunting. Besides providing an important recreational opportunity with economic benefits, this is essential for managing the herd so that disease transmission and environmental impacts are minimized.

We are very concerned about the economic impact that Plan E will have on our area. Our DNR reports that, as recently as 1988, 52% of all use of Pool 5A, for instance, was still directly related to fishing, hunting, or trapping. Other types of uses such as wildlife watching have certainly grown since then, but this growth has occurred in concert with continued use by groups like hunters. Individual businesses and chambers of commerce have told us that they cannot afford to lose one of these groups of customers. The importance of hunting and trapping to our economy is highlighted by the fact that Wisconsin has ranked as high as fourth nationwide in the number of jobs supported by the economic activity of hunters (Vander Zouwen, 1998).

We are concerned that proposed pet restrictions will eliminate people's ability to swim their dogs. Our constituents appreciate the current easy access to water and the types of dogs that are prevalent in our area need practice in the water. Plan E underestimates the value of this to local people.

We are concerned that not enough emphasis is placed on invasive species management and protection.

Our constituents have expressed concern that there is not enough access to shoreline and handicapped fishing. You should work with the Corp of Engineers to improve access at locks and dams.

Many of the items contained in this plan require cooperation with the Wisconsin DNR and legislature because the regulations will need to be incorporated into our rules before there can be realistic enforcement. There will be significant resistance to many of the features of this plan and, at this point, we do not think they can be adopted by the state.

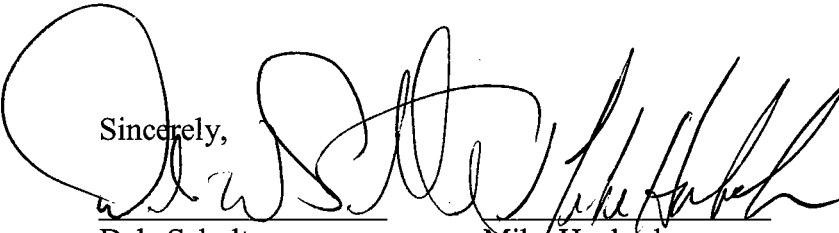
We want to reiterate our request that, in order for your agency to be good neighbors and to preserve public support for having this refuge in our back yard, you join us in advocating for maximum recreational opportunities and continuing to manage the river as a multi-purpose resource. That is not at odds with the goals of the refuge because we do not believe new restrictions will conserve fish and wildlife. From the life's work of Wisconsin's own Aldo Leopold, we know that healthy fish and wildlife habitat is the key to having good fish and wildlife populations and that is where the service should focus its efforts. We strongly believe that increasing refuge closed areas will do nothing to improve fish and wildlife populations over all.

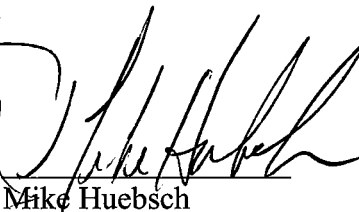
People who spend time on the river understand that the river has many friends. We co-exist with commercial and industrial uses and cooperate with other recreational users. Article 9 of Wisconsin's Constitution requires it. The effect of recreational activities is inconsequential compared to the combined forces of everything that happens on the land throughout the Mississippi River Valley. The good that comes from having so many people who love the river outweighs any benefit that could conceivably come from alienating them as your preferred alternative still does. If you take away our connection to the land, you will lose public support for having federally owned land in our area.

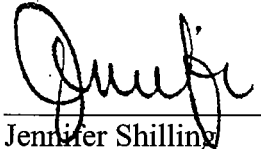
Again, we oppose Alternative E and any plan which restricts access to recreational activities and navigation because they usurp state authority on sovereign water and unnecessarily eliminate recreational opportunities and economic activity. We support the current level of public use of this spectacular resource. Thank you again for the work that we are asking you and your staff to do so that our outdoor recreation heritage is preserved on waters of the mighty Mississippi.

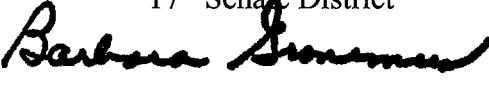
Page 4, March 1, 2006
Don Hultman, Manager

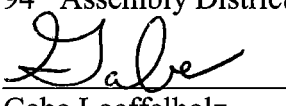
Sincerely,

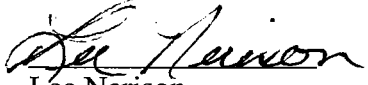

Dale Schultz
Senate Majority Leader
17th Senate District

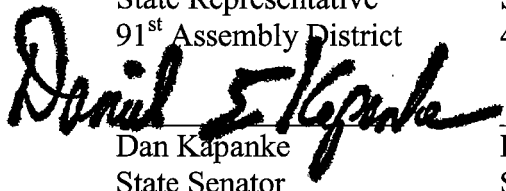

Mike Huebsch
Majority Leader
94th Assembly District

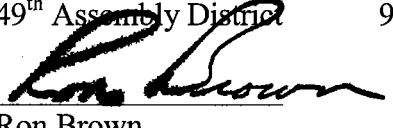

Jennifer Shilling
State Representative
95th Assembly District


Barbara Gronemus
State Representative
91st Assembly District


Gabe Loeffelholz
State Representative
49th Assembly District


Lee Nerison
State Representative
96th Assembly District


Dan Kapanke
State Senator
32nd Senate District


Ron Brown
State Senator
31st Senate District

Copies to: President George W. Bush, Vice President Richard Cheney, Senator Russell Feingold, Senator Herb Kohl, Representative Ron Kind, USF&WS Regional Director Robyn Thorson

Enclosure: January 13, 2006 Wisconsin Legislative Council Memo



WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: SENATORS RONALD BROWN, DAN KAPANKE, AND DALE SCHULTZ, AND
REPRESENTATIVES BARBARA GRONEMUS, MICHAEL HUEBSCH, GABE
LOEFFELHOLZ, LEE NERISON, AND JENNIFER SHILLING

FROM: Mark C. Patronskey, Senior Staff Attorney

RE: Wisconsin Sovereignty and Jurisdiction Over Waters of the Upper Mississippi River
National Wildlife and Fish Refuge

DATE: January 13, 2006

You have asked me to review the memorandum that I prepared on August 24, 2005, that discusses legal issues regarding Wisconsin state sovereignty and jurisdiction over waters of the Mississippi River which are also part of the Upper Mississippi River National Wildlife and Fish Refuge. This issue is of current concern because the U.S. Fish and Wildlife Service, which manages the refuge, is in the process of planning regulatory policy for the refuge that will apply for the next 15-year period. Your concerns relate primarily to those parts of the plan that restrict the methods of navigation and that prohibit entry by watercraft in designated areas of the refuge.

The U.S. Fish and Wildlife Service has modified the provisions of Alternative D, which was previously identified as the preferred alternative in the comprehensive conservation plan, and issued Alternative E, the new preferred alternative. Although provisions of the plan related to navigation have been changed, the fundamental issues of state sovereignty and jurisdiction still remain. The remainder of this memorandum restates the contents of my previous memorandum.

Introduction

There is not an express prohibition in federal law that precludes the U.S. Fish and Wildlife Service from restricting or banning the use of motorized watercraft within the refuge. However, there are a number of provisions in federal and state law that raise fundamental questions about the authority of the U.S. Fish and Wildlife Service to adopt and enforce regulations that restrict or prohibit motorized watercraft in portions of the Mississippi River, and its sloughs and tributaries.

Although it is difficult to answer this question definitively, the issues discussed in this memorandum would provide a substantial basis for a legal challenge to the regulations, if the regulations were to be implemented. It should be noted that the issues discussed in this memorandum are all legal issues. Unlike the factual issues, and decisions within the discretionary authority of the agency, legal issues are addressed and resolved by the court without deference to the decisions of the agency.

Acceptance of the Upper Mississippi River Fish and Wildlife Refuge With State-Imposed Conditions

The federal enabling legislation for the refuge requires the U.S. government to obtain the consent of the states before purchasing land for the refuge. The refuge was authorized by Congress in the Upper Mississippi River Wildlife and Fish Refuge Act (June 7, 1924); 68th Congress, ch. 346; 16 U.S.C. ss. 721 to 731. The Refuge Act expressly required the U.S. government to obtain the consent by law of Wisconsin before acquiring land for the refuge. [16 U.S.C. s. 724.]

Wisconsin did consent to establishment of the refuge in s. 1.035, Stats., which was adopted by Laws of 1925, Ch. 170, and took effect on May 23, 1925. The plain meaning of the federal enabling legislation is that if the consent of the states is required, the states may either withhold or condition that consent. The statute includes a number of conditions on the state's approval of the refuge, including the following:

- Any conditions or reservations imposed by Illinois, Iowa, and Minnesota are also adopted by Wisconsin.
- Acquisition of land by the U.S. government must be approved by the Governor on advice of the Department of Natural Resources.
- Wisconsin retains legal title to fish for the purpose of regulating the use and conservation of the fish.
- The state retains jurisdiction over civil and criminal process.

For the purposes of the legislator's request for information, one of the conditions in s. 1.035 (2), Stats., is most significant. This provides as follows:

1.035 (2) The consent hereby given is upon the condition that ... the navigable waters leading into the Mississippi and the carrying places between the same, and the navigable lakes, sloughs and ponds within or adjoining such areas, shall remain common highways for navigation and portaging, and the use thereof, as well to the inhabitants of this state as to the citizens of the United States, shall not be denied.

These conditions have apparently been accepted by the U.S. government in establishment of the refuge. This statutory restriction, which mirrors the Wisconsin Constitution (art. IX, s. 1, discussed later in this memorandum) states, as clearly as possible, that restrictions may not be imposed on navigation in any of the navigable waters leading into the Mississippi.

The Public Trust in Navigable Waters in Wisconsin

At the time of statehood, the State of Wisconsin received title to the navigable lakes and streams. The state's interest in the navigable waters is established and protected in the Wisconsin Constitution, art. IX, s. 1, which provides as follows:

Jurisdiction on rivers and lakes; navigable waters. Section 1. The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty

This provision from the Wisconsin Constitution is the foundation for most of the Wisconsin law regarding navigable waters. In Wisconsin, the navigable waters are held in trust by the state for the public. The Legislature is the trustee of the public trust in navigable waters, responsible for protecting them for the benefit of the public, and the Legislature is without power to abrogate this trust. The condition described above in s. 1.035 (2), Stats., is a good example of how the Legislature protects these rights of navigation for the citizens of Wisconsin. In fact, consent by the Wisconsin Legislature to creation of the refuge without the conditions in s. 1.035 (2), Stats., would not appear to constitute valid consent.

Northwest Ordinance

Public rights in navigable waters are protected by not only the state, through its constitution and statutes, but also by federal law, through the northwest ordinance.

The historical source of Wisconsin's public trust in navigable waters is the northwest ordinance of 1787. The purpose of the northwest ordinance was to admit new states to the union on an equal footing with the original 13 states. The northwest ordinance included a provision regarding the navigable waters in art. IV, which provides in part: "...the navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same, shall be common highways and forever free, as well as to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefore...." This language was adopted with only slight changes as part of the Wisconsin Constitution in 1848.

The U.S. Supreme Court has discussed the continued viability of the northwest ordinance.

To the extent that it pertained to internal affairs, the Ordinance of 1787— notwithstanding its contractual form—was no more than a regulation of territory belonging to the United States, and was superseded by the admission of the State of Illinois into the Union "on an equal footing with the original states in all respects whatever" [citing cases]. But, so far as it established public rights of highway in navigable waters capable of bearing commerce from State to State, it did not regulate internal affairs

alone, and was no more capable of repeal by one of the States than any other regulation of interstate commerce enacted by the Congress; being analogous in this respect to legislation enacted under the exclusive power of Congress to regulate commerce with the Indian tribes.

The Court went on to say that this view was not inconsistent with previous decisions on the question:

Those cases simply hold, in effect, that a State formed out of a part of the Northwest Territory has the same power to regulate navigable waters within its borders that is possessed by other States of the Union; that is to say, until Congress intervenes, the power of the State, locally exerted, is plenary; nevertheless, where the navigation serves commerce among the states or with foreign nations, Congress has the supreme power when it chooses to act, and is not prevented, by anything the States may have done, from assuming entire control in the matter. [*Economy Light & Power Co. v. United States*, 256, U.S. 113, 121 (1921).]

The northwest ordinance has been incorporated into the Wisconsin Constitution, and subsequent Wisconsin common law as created by the Wisconsin Supreme Court has expanded the public trust in navigable waters to include recreational uses.

Federal Case Law

It does not appear that there is a federal case that is directly on point regarding the issue of whether the U.S. Fish and Wildlife Service may restrict or prohibit navigation in the refuge. However, this issue was discussed as part of a 1928 federal district court case from the Western District of Wisconsin. *United States v. 2,271.29 acres more or less, of land in La Crosse, Trempealeau, Vernon, and Grant Counties, Wis., et al.*, 31 F. 2d 617. This case was a challenge to the condemnation of land for the refuge, and did not involve condemnation or regulation of navigable waters.

However, the issue of use of the navigable waters was of sufficient importance that it was part of the challenge to the condemnation. One of the grounds for challenging the federal legislation that created the refuge was that "the state holds and controls navigable waters in trust for its people, and may not delegate such trust to another sovereignty..." (p. 620). The court disposed of this issue on the grounds that the condemnation did not involve navigable waters. However, the court acknowledged that this was a "question of unlawful abdication by the state of its obligation of people in that regard." The court further recognized that the right to regulate fish and game is a matter of state sovereignty. The court reviewed the conditions of Wisconsin's consent to creation of the refuge under s. 1.035, Stats. The court cited a number of Wisconsin Supreme Court cases that show how carefully the court has protected the right of the public to hunt and fish, and the court further noted that the Wisconsin court cases further hold that the right to hunt and fish is a part of the right of navigation. (p. 621.) Although this case did not involve directly the issue of navigable waters, the court recognized that the consent given by the state could include the provisions of Wisconsin law that create and protect the public trust in navigable waters.



WISCONSIN LEGISLATURE

P.O. BOX 8952 • MADISON, WI 53708

December 28, 2005

U.S. Fish & Wildlife Service
Upper Mississippi River National Wildlife and Fish Refuge
CCP Comment: Don Hultman, Manager
51 East 4th Street
Room 101
Winona, MN 55987

7562

Dear Mr. Hultman:

We are writing to request an extension of the review period for Alternative E of the Comprehensive Conservation Plan (CCP) for the Upper Mississippi River Fish & Wildlife Refuge by at least sixty-days. Additionally, we urge you to accept public comment at all meetings in such a way that those comments will be a part of the official public record that is available to the media and anyone else who is interested.

Our legislative districts form the eastern border of the Upper Mississippi River Fish & Wildlife Refuge. Our constituents have told us vociferously that a lengthy comment period and official public hearings are important to them. We strongly agree both in theory and in practice. When our own public land management agencies prepare property management plans, public participation is a required part of that process.

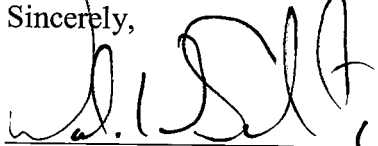
We appreciate that you responded to some of the concerns that we and our constituents had with the plan that you initially favored. As we review the new plan we will consider whether those concerns have been adequately addressed. Our first impression is that more must be done to ensure that navigation is not improperly restricted and so that outdoor recreation opportunities, which are one of the purposes for the refuge, are maintained.

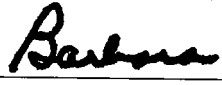
One of our concerns is for you as an agency whose job it is to manage the refuge. We have experience with several large state-owned properties in Western Wisconsin and we have found that the public's support for this kind of property is important almost beyond description. If you lose broad public support then funding, regulatory, and political pressures become persistent challenges. This refuge has enjoyed good, even enthusiastic, public support. We see no reason to risk that by eliminating too many of the recreational opportunities that our constituents and visitors currently enjoy.

Subjecting the revised CCP to the highest level of public scrutiny is appropriate considering the cultural, social, and economic significance the refuge has in the lives of our constituents. Consequently, we once again urge the USFWS to extend the public comment period and hold official public meetings on your revised plan for management of the Upper Mississippi River Fish & Wildlife Refuge.

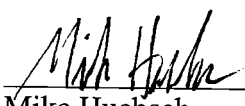
Thank you in advance for acting on our request.

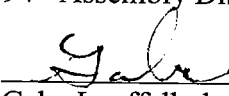
Sincerely,


Dale Schultz
Senate Majority Leader
17th Senate District

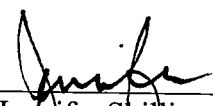

Barbara Gronemus
State Representative
91st Assembly District



Dan Kapanke
State Senator
32nd Senate District


Mike Huebsch
Majority Leader
94th Assembly District


Gabe Loeffelholz
State Representative
49th Assembly District


Ron Brown
State Senator
31st Senate District


Jennifer Shilling
State Representative
95th Assembly District


Lee Nerison
State Representative
96th Assembly District

Copies to: President George W. Bush, Vice President Richard Cheney, Senator Russel Feingold, Senator Herb Kohl, Representative Ron Kind, USF&WS Director H. Dale Hall, USF&WS Regional Director Robyn Thorson